

SERVICE DATE – LATE RELEASE NOVEMBER 2, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-868X¹

MISSISSIPPI TENNESSEE HOLDINGS, LLC–ABANDONMENT EXEMPTION–
IN UNION, PONTOTOC AND CHICKASAW COUNTIES, MS

REQUEST TO SET TERMS AND CONDITIONS

Decided: November 2, 2004

By decision and notice of interim trail use or abandonment served on July 26, 2004, we granted a petition for exemption under 49 U.S.C. 10502 permitting Mississippi Tennessee Holdings, LLC (MTH) to abandon, and Mississippi Tennessee Railroad LLC to discontinue service over, a 43.2-mile line of railroad in Union, Pontotoc and Chickasaw Counties, MS. The line extends from milepost 324.2 near New Albany to the end of the line at milepost 281.0 near Houston, MS. The exemption was scheduled to become effective on August 25, 2004, unless an offer of financial assistance (OFA) was filed under 49 U.S.C. 10904 and 49 CFR 1152.27(c) on or before August 5, 2004.

On August 5, 2004, Hust Brothers, Inc. (HB) timely filed an OFA to purchase the entire line for \$1,252,232. On August 9, 2004, a decision was served postponing the effective date of the July 26, 2004, decision and giving the parties until September 7, 2004, to reach an agreement for the sale of the line. By decision served on August 20, 2004, the due date for requests to establish the terms and conditions for the sale of the line was extended to October 4, 2004, and the due date for replies to any request to set terms and conditions was extended to October 12, 2004.

On October 4, 2004, HB requested that we set terms and conditions for the sale because the parties were unable to agree on the sale price. In its request, HB contends that the purchase price for the line should be set at \$1,327,069.27, consisting of \$346,500 for land and \$980,569.27 for track materials. To support its valuation, HB submitted a land appraisal prepared by Paul A. Heath of Mississippi Appraisal Services, Ltd. (Heath) and an appraisal of track materials prepared by Landreth Engineering, LLC (Landreth).

¹ Prior decisions in this proceeding have also embraced Mississippi Tennessee Railroad, LLC–Discontinuance of Service Exemption–in Union, Pontotoc and Chickasaw Counties, MS, STB Docket No. AB-869X.

On October 12, 2004, MTH responded to the request to set terms and conditions. MTH contends that the line is worth \$3,747,007, consisting of \$1,800,000 for land and \$1,947,007 for track materials. To support its valuation, MTH submitted a land appraisal prepared by Kenneth Young & Associates (KYA), which included a verified statement from Kenneth Young, and a verified statement from Randy Cundiff, MTH's Vice President, concerning track and bridge materials.

After considering the evidence and arguments submitted by the parties, we are setting the purchase price at \$3,747,007.

TERMS AND CONDITIONS

Valuation and Evidentiary Standards. Proceedings to set conditions and compensation are governed by the provisions of 49 U.S.C. 10904(d)-(f). Under section 10904(f)(1)(B), the Board may not set a price that is below the fair market value of the line. In Chicago and North Western Transp. Co.—Abandonment, 363 I.C.C. 956, 958 (1981) (Lake Geneva Line), aff'd sub nom. Chicago and North Western Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982), it was determined that, in the absence of a higher going concern value for continued rail use, the proper valuation standard in proceedings for offers to purchase under section 10904 is the net liquidation value (NLV) of the rail properties for their highest and best nonrail use. NLV includes the value of the underlying real estate plus the net salvage value of track and materials.

In these proceedings, the burden of proof is on the offeror, as the proponent of the requested relief. See Lake Geneva Line, 363 I.C.C. at 961. Placing the burden of proof on the offeror is particularly appropriate because the offeror may withdraw its offer at any time prior to its acceptance of terms and conditions that we establish pursuant to a party's request. The rail carrier, on the other hand, is required to sell its line to the offeror at the price we set, even if the railroad views the price as too low.

Because the burden of proof is on the offeror, absent probative evidence supporting the offeror's estimates, the rail carrier's evidence is accepted. In areas of disagreement, the offeror must present more specific evidence or analysis or provide more reliable and verifiable documentation than that which is submitted by the carrier. If the offeror does not present such evidence and/or documentation, then, given the burden of proof and the short deadline provided in the statute, we must accept the carrier's estimates in these forced sale proceedings. See Burlington Northern Railroad Company—Abandonment Exemption—In Sedgwick, Harvey and Reno Counties, KS, Docket No. AB-6 (Sub-No. 358X) (ICC served June 30, 1994), and cases cited therein. We will address below the value of the land and track and materials.

Land. The appraisal from HB witness Heath values the land at \$346,569.27. He indicates that he examined local real estate records, including tax assessment records, and visually inspected the line. Mr. Heath states that he used an Across the Fence (ATF) methodology, comparing sales of 11 commercial properties, residential properties and agricultural properties in the three counties where the line is located. Mr. Heath then made adjustments to the values determined for the portion of the line in each county for location, size and utility. Mr. Heath determined that the total value of land in the three counties, before adjustments, is \$876,120.

Mr. Heath states that he also examined deeds for land in the right-of-way and determined that MTH owned fee interests in 44% of the properties and an easement interest in the remaining 56% of the properties. To reflect MTH's fee interest ownership, Mr. Heath then adjusted his total real estate value by multiplying \$876,120 by 44% to arrive at a final land valuation of approximately \$385,000. Mr. Heath then adjusted the purchase price by 10% to reflect the cost of sale to arrive at his final adjusted value of the line of about \$346,600.

To support its contention that MTH only owns an easement interest in 56% of the right-of-way and thus justify the adjustment to reflect the alleged non-fee interest in the right-of-way, HB submitted a legal memorandum from Ms. Ruth Hawe of the law offices of Van Cott, Bagley, Cornwall and McCarthy. The legal memorandum interpreted a deed that transferred from W. W. Guinn to the Gulf and Ship Inland Railroad Company "a strip of land one hundred feet wide . . . the same being for the right-of-way, switches, tracks depot grounds, and other railroad purposes" and concluded that it conveyed an easement interest, not a fee interest.

HB also submitted copies of four deeds that it claims are samples of deeds showing that MTH holds an easement interest in portions of the line. In the first deed, dated January 14, 1902, W. H. Bolton granted a "right of way" consisting of 31.45 acres to New Orleans M.M. RR. Co. In the second deed, dated January 13, 1902, B. T. Eddington granted a 100-foot wide "right-of-way" to New Orleans & M.M. RR. Co. In the third deed, dated January 1, 1904, E. J. Walker granted a "strip one hundred feet wide" to the Gulf and Chicago Railway Company. In the fourth deed, dated December 13, 1907, Mr. and Mrs. Jess Bell granted a "strip of land one hundred feet wide" to the New Orleans Mobile & Chicago Railroad Company.

The KYA appraisal submitted by MTH values the land at \$1,800,000. The appraisal indicates that the appraiser inspected the line and examined railroad valuation maps that were supplied by MTH's parent, Ironhorse Resources, Inc., and zoning maps, city street maps, parcel plats and other material that were supplied by city and village officials. The KYA appraisal divided the right-of-way into 27 parcels and, using an ATF methodology, considered 40 comparable sales of land in the area of the line. The appraisal then adjusted the ATF values for each parcel for topography, shape, curvature, width and marketability. Adjustments were also made to reflect a 2-year sell-off period for industrial

and commercial properties, a 3-year sell-off period for residential properties, a 4-year sell-off period for agricultural properties and a 2-year sell-off period for rural business properties. After these adjustments, an estimated adjusted ATF value for all parcels was determined to be \$2,300,000. The estimated value was reduced by 3% to reflect real estate sales costs, and by a 12% discount rate to reach a final value of \$1,800,000. The KYA appraisal assumed that MTH holds fee simple interest in the entire line.

Responding to HB's material purporting to show that MTH holds some easement interests, MTH asserts that HB did not provide a copy of the deed that is the subject of the legal memorandum or show that the deed interpreted in the opinion involved land that is part of the right-of-way here. MTH asserts further that the deeds submitted by HB do not support the claim that 56% of the right-of-way is held as easement interests. In support, MTH cites Mississippi Cent. R.R. Co. v. Ratcliff, 59 So.2d 311 (Miss. 1952) (Ratcliff), which found that, when the granting clause of a deed to a railroad company conveys "land" or a "strip of land" and the recitals of the deed and/or the habendum clause refer to the grant as a "right-of-way," the granting clause prevails and the deed is considered to convey a fee simple interest. The decision also noted that, under Mississippi law, if the language of a deed is ambiguous and uncertain as to the estate intended to be granted, the deed will be construed to pass a fee rather than a lesser estate. MTH also notes that HB has not shown a correlation between the land encompassed by the deeds and the claim by Mr. Heath that 56% of the right-of-way is held as easement. Also, Mr. Young's rebuttal statement indicates that, in making the KYA appraisal, he reviewed deed legends on valuation maps and excluded non-fee simple property from KYA's valuation.

MTH indicates that, before it acquired the line in 2003, it arranged for a title examination of the property by the law firm of Holcomb Dunbar of Southaven, MS. MTH submitted a title opinion dated March 14, 2003, from Holcomb Dunbar indicating that fee simple title to the right-of-way land was vested in the rail carrier from which MTH was acquiring the rail line. The title opinion encompassed all of the right-of-way land to be acquired by MTH. MTH also submitted a copy of a title insurance policy that was issued by Chicago Title Insurance Company on July 10, 2003. The policy, which was allegedly based on the title opinion by Holcomb Dunbar, insured that fee simple title to the right-of-way land is vested in MTH.

HB criticizes several aspects of the KYA appraisal. HB asserts that the KYA appraisal relied on stale evidence, noting that only 5 of the comparative sales occurred in 2004 and 11 in 2003, and that the remaining 24 transactions occurred between 1996 and 2002. HB claims that some of the adjustments are inappropriate. It notes that the KYA appraisal does not define marketability. It also disagrees with the adjustments on several parcels for topography, claiming that higher adjustments were warranted. HB also contends that the value of one segment should have been discounted by 50% because the right-of-way traverses a wetland. Finally, HB contends that KYA did not support a 3%

discount for average sales expenses; it claims that the real estate sale discount should be 10% to reflect real estate commissions and advertising.

Mr. Young responds that the one sale that occurred in 1996 was used in combination with other more recent sales to value 9 of the 27 parcels. He notes that a majority of comparable sales that were used for valuing these parcels occurred between 1999 and 2002 and were adjusted to reflect current market prices. Mr. Young notes that the Heath appraisal considers only 11 comparable sales ranging from 2001 to 2004, whereas Mr. Young considered 40 comparable sales.

Responding to HB's assertions about the adjustments made to the appraisal, Mr. Young indicates that KYA's claim of marketability stems from the comparative land values used and market conditions, as well as the nature of the parcel. Mr. Young asserts that the parcel where the wetland is located was properly adjusted and that only a small portion of the parcel was affected by the wetland. Mr. Young states that the 3% sales expense reflects experiences by MTH in selling other property in-house. He claims that the 10% sales expense suggested by HB is excessive.

HB has the burden of showing that MTH lacks marketable title for 56% of the property. Burlington Northern Railroad Company—Abandonment Exemption—in Snohomish County, WA, Docket No AB-6 (Sub-No. 375X) (STB served Mar. 11, 1996). HB has not met its burden. HB has not shown that the legal memorandum by Ms. Hawe that HB submitted to support its assertion about MTH's property interest is relevant to this proceeding. As MTH noted, HB did not submit a copy of the deed interpreted by the opinion or show that the deed involved property on the line. Absent a showing of relevance, the opinion by Ms. Hawe has no probative value here.

In addition, the four deeds that HB submitted to support its assertion are inconclusive. The record does not indicate where the land described in each deed is located on the line and whether the deeds, in fact, relate to this line. Also, the language of the deeds is ambiguous. Moreover, under the Ratcliff decision cited by MTH, it appears that the deeds at issue could be construed under Mississippi law to pass a fee interest to the railroad, rather than an easement interest as HB claims. Even if the four deeds relate to the line and could be interpreted to establish easements for the properties, they are insufficient to support HB's claim that 56% of the right-of-way is held as easement.²

² We also question Mr. Heath's methodology for determining the value of property held in fee by appraising the entire line and multiplying the result by 44% to reach the value of property held in fee. It would have been preferable for Mr. Heath to designate the specific parcels of the line that he determined were held in fee simple, and to value only those parcels.

On the other hand, the legal opinion by Holcomb Dunbar and the title insurance policy that was issued when MTH acquired the line are persuasive in establishing that MTH acquired a fee simple interest in the line in 2003.

The burden of proof obligates HB to present more specific evidence or analysis or provide more reliable and verifiable documentation than that which was submitted by MTH. HB has not done so. Rather, KYA's appraisal is more detailed and better-supported than the Heath appraisal. Mr. Young has also adequately supported the adjustments made in KYA's appraisal, and MTH has sufficiently established that it has a fee simple interest in the line. In light of this, we will accept MTH's estimates.

Based on the best evidence of record, we set the value of the land at \$1,800,000.

Track Materials. HB witness Landreth provides a detailed inventory of track, materials and ties, and estimated removal costs, and concludes that the net salvage value of track and material is \$980,569.27. The Landreth estimate includes a net salvage value of \$1,075,803.81 for track and materials, and \$322,805.46 for ties. The estimate provides quotes to support the projected values of scrap steel, but does not provide any salvage value for ties or ballast. The estimate computes a negative salvage value of \$418,040 for bridges and grade crossings.

In response, MTH witness Cundiff submitted copies of four written offers to purchase, on a net basis (including removal, transportation, and disposal), all track and bridge materials, including ties and ballast, for a total of \$1,947,007. These offers consist of: a bid of \$1,793,865 from Progress Rail Services to purchase all rail and other track material; a bid of \$44,300 from United Rail Materials to purchase ties; and two separate bids from Biodiesel of MS, Inc. of \$77,260 for all ballast located on the line, and \$31,582 for bridge materials. There were no contingencies in any of the offers.

A written offer without significant contingencies has been determined to be the best evidence of the net salvage value of the line. The Grand Trunk Western Railroad Company—Abandonment—In Clark, Madison and Fayette Counties, OR, Docket No. AB-31 (Sub-No. 29) (ICC served June 26, 1990). Under section 10904, the price we set to compensate a railroad for the forced sale of its assets can be no lower than its fair market value. The written offers submitted by MTH represent the best record evidence of the fair market value for MTH's assets. Accordingly, we will accept the figures submitted by MTH and set the net salvage value for track and materials at \$1,947,007.

In addition to the compensation specified here, we will impose our typical OFA terms: (1) payment is to be made by cash or certified check; (2) closing is to occur within 90 days of the service date of this decision; (3) MTH shall convey all property by quitclaim deed; and (4) MTH shall

deliver all releases from any mortgage within 90 days of closing. The parties may alter any of these terms by mutual agreement.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The purchase price for the line is set at \$3,747,007, and the parties must comply with the terms of sale discussed above.
2. To accept the terms and conditions established here, HB must notify the Board and MTH in writing, on or before November 12, 2004.
3. If HB accepts the terms and conditions established by this decision, HB and MTH will be bound by this decision.
4. If HB withdraws its offer or does not accept the terms and conditions with a timely written notification, we will serve a decision by November 22, 2004 vacating the prior decision that postponed the effective date of the decision authorizing abandonment.
5. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A Williams
Secretary